SUPREME COURT, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

No. 91-7749

In The

Supreme Court of the United States

October Term, 1992

JOSE ANTONIO ORTEGA-RODRIGUEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Certiorari Granted June 15, 1992

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CHRONOLOGICAL LIST OF
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June 21, 1990 – Mr. Ortega's indictment for contempt of court for failure to appear for sentencing in *United States v. Jose Antonio Ortega-Rodriguez*, Case No. 88-10035-Cr-KING, and for failure to appear at sentencing.

January 9, 1991 – Mr. Ortega's Motion for Judgment of Acquittal.

January 11, 1991 – Judgment and Sentence of Mr. Ortega.

January 28, 1991 – Mr. Ortega's Notice of Appeal.

April 12, 1991 – Mr. Ortega's Judgment and Sentence Order for Contempt of Court and Failure to Appear.

May 15, 1991 – Government's motion to dismiss Mr. Ortega's appeal.

May 21, 1991 – Mr. Ortega's response to government's motion to dismiss his appeal.

July 19, 1991 – Order of the United States Court of Appeals for the Eleventh Circuit which grants the government's motion to dismiss Mr. Ortega's appeal.

August 9, 1991 – Mr. Ortega's Motion to Reinstate Appeal.

August 23, 1991 – Government's response to Mr. Ortega's motion to reinstate appeal.

September 20, 1991 – Mr. Ortega's reply to government's response to his motion to reinstate appeal.

January 22, 1992 – Order of United States Court of Appeals for the Eleventh Circuit denying Mr. Ortega's Motion to reinstate appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-10035-Cr-JUDGE KING

UNITED STATES OF AMERICA :

v. :

JOSE ORTEGA-RODRIGUEZ :

MOTION TO VACATE SENTENCE AND
FOR RESENTENCING
(Dated JUN 7, 1980)

The Defendant Jose Ortega-Rodriguez, through counsel and pursuant to Rules 32 and 43 of the Federal Rules of Criminal Procedure, respectfully moves that the sentence previously imposed in the above-styled cause on June 22, 1989 be vacated and that Defendant be resentenced, and as grounds therefor says:

1. Defendant, along with two co-defendants, was charged in a two count indictment with possession with intent to distribute in excess of five kilograms of cocaine on a United States registered vessel and with conspiracy to commit the aforesaid act in violation of Title 46, United States Code, Sections 1903(a) and (j) respectively.

2. On March 20, 1989, all of the defendants proceeded to trial. They were all found guilty after trial by jury on March 24, 1989.

3. At the time that the adverse verdict was returned in Key West, Florida, this Court announced that sentencing would take place in Miami; however, a date was not available at that time and defendants were notified that they would receive notice once a sentencing date was scheduled.

4. Defendant did not appear before this Court on the referenced sentencing date. At that time, this Court elected to sentence Defendant *in absentia* to a period of incarceration of 235 months on each of counts I and II to be served concurrently. In addition, a five year term of supervised release was imposed as to count I and Defendant was assessed the sum of $100. The referenced sentencing proceeding took place over defense objection due to the absence of Defendant and his inability to address the Court on his own behalf.

Rule 43(a) of the Federal Rules of Criminal Procedure provides in applicable part:

> The Defendant shall be present . . . at the imposition of sentence, except as otherwise provided by this Rule.

See also United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980), *citing Caille v. United States*, 487 F.2d 614 (5th Cir. 1973).

As additional authority, Defendant turns to Rule 32 of the Federal Rules of Criminal Procedure. This Rule provides in applicable part:

> . . . Before imposing sentence, the court shall also –

> (A) determine that the defendant and his counsel have had the opportunity to read and discuss the pre-sentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B) . . .
>
> (C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

Finally, Rule 32(a)(2) provides that the defendant shall be informed as to his appellate rights by the sentencing court.

In the instant case, Defendant was never addressed personally by this Court as to whether he had the opportunity to review his pre-sentence investigation report and to discuss same with counsel. Similarly, Defendant did not have the opportunity to address the Court on his own behalf and/or to provide mitigation as to why he should have received a lesser sentence. Moreover, Defendant was never informed personally of his right to appeal his conviction, apparently contrary to the provisions of Rule 32.

Defendant respectfully requests that the sentence imposed in the above-styled case on June 22, 1989 be vacated and that this matter be reset for sentencing before this Court. In this manner, Defendant will receive the opportunity to personally address the Court and offer mitigation as to the sentence imposed. In addition, the requirements of Rules 32 and 43 could be fulfilled and Defendant would then be in a position to pursue the remainder of his legal remedies.

5. Odilio Diaz, the Assistant United States Attorney who is handling this matter for the government, does hereby oppose the relief sought herein.

JAMES R. GAILEY
ACTING FEDERAL
PUBLIC DEFENDER

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(Certificate Omitted In Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 90-0398 CR-KING
18 U.S.C. § 401(3)
18 U.S.C. § 3146

(Caption Omitted In Printing)

MAGISTRATE JOHNSON

INDICTMENT

The Grand Jury charges that:

COUNT I

On or about June 15, 1989, at Miami, Dade County, in the Southern District of Florida, the defendant,

JOSE ANTONIO ORTEGA-RODRIGUEZ,

knowingly and willfully, and in disobedience to and resistance to a lawful order and command of the United States District Court for the Southern District of Florida, given at Miami, Florida, on or about April 24, 1989, in *United States v. Jose Antonio Ortega-Rodriguez*, Case No. 88-10035-Cr-KING, did fail to appear for sentencing as ordered by the Court; in violation of Title 18, United States Code, Section 401(3).

COUNT II

On or about June 15, 1989, at Miami, Dade County, in the Southern District of Florida, the defendant,

JOSE ANTONIO ORTEGA-RODRIGUEZ,

having previously been convicted of violations of Title 46, United States Code, Sections 1903(a), (g) and (j), that is,

while aboard a vessel of the United States, possession with intent to distribute and conspiracy to possess with intent to distribute in excess of five (5) kilograms of cocaine, a Schedule II narcotic controlled substance, offenses punishable by imprisonment for a term of fifteen (15) years or more, and having been released by the United States District Court for the Southern District of Florida pursuant to Chapter 207 of Title 18, United States Code, Section 3141 *et seq.*, in *United States v. Jose Antonio Ortega-Rodriguez*, Case No. 88-10035-Cr-KING, did knowingly fail to appear before said Court as required by the conditions of his release, in that the defendant failed to appear for sentencing as ordered on April 24, 1989 by said Court; in violation of Title 18, United States Code, Section 3146.

A TRUE BILL
/s/ Illegible
FOREPERSON

/s/ Dexter W. Lehtinen (initials illegible)
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. ___

(Caption Omitted In Printing)

ESTIMATED TRIAL TIME

CERTIFICATE OF TRIAL ATTORNEY

I do hereby certify:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of

probable witnesses and the legal complexities of the indictment/information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. This case will take 2 days for the parties to try.

4. (Check the appropriate category)

X	I	0 to 5 days
	II	6 to 10 days
	III	11 to 20 days
	IV	21 to 60 days
	V	61 days and over

5. Has this case been previously filed in this Court?
NO*** (Yes or No)

If yes, Judge: _____ (Attach copy of
Case No: _____ dispositive order)

6. This case orginated in the U.S. Attorney's office *prior* to August 16, 1985 _____ (Yes or No)

/s/ Odilio M. Diaz
ODILIO M. DIAZ
ASSISTANT UNITED STATES ATTORNEY

*** This is a matter arising out of Case No. 88-10035-Cr-KING and pending before Judge KING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-10035-Cr-KING
(Florida Bar No. 371076)

(Caption Omitted In Printing)

ORDER ON DEFENDANT'S MOTION TO VACATE SENTENCE AND FOR RESENTENCING

This cause is before the Court on Defendant's Motion to Vacate Sentence and for Resentencing. Pursuant to a hearing conducted before this Court on October 11, 1990, it is

ORDERED that the mentioned motion is hereby GRANTED. The sentence previously imposed in the above-styled cause on June 22, 1989, is hereby VACATED. It is further ordered that this matter is hereby set for resentencing before this Court on Wednesday, December 19, 1990, at 1:30 p.m.

DONE and ORDERED at Miami, Florida, this 12 day of October, 1990.

JAMES LAWRENCE KING
JAMES LAWRENCE KING,
CHIEF U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-10035-Cr-KING

(Caption Omitted In Printing)

MOTION FOR JUDGMENT OF ACQUITTAL

Defendant Jose Antonio Ortega-Rodriguez, through counsel and pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, respectfully moves for a judgment of acquittal in regard to the above-styled cause, and as grounds therefor says:

1. Defendant, along with two co-defendants, was charged in a two count indictment with having possessed with intent to distribute in excess of five kilograms of cocaine while on board a vessel of the United States, and with conspiracy to commit the aforesaid act, in violation of Title 46, United States Code Appendix, Sections 1903(a) and (j) respectively.

2. On March 20, 1989, all defendants proceeded to trial before the District Court in Key West, Florida. The trial proceedings were bifurcated in that there was a statement attributable to co-defendant Mieres-Borges and no statements were made by either Defendant or the remaining co-defendant Becerra-Flores. Accordingly, in order to avoid *Bruton*[1] problems the jury heard all of the evidence without Mieres' statement and then heard closing argument on behalf of Becerra and Defendant. The jury then deliberated and returned sealed verdicts as to

[1] *Bruton v. United States*, 391 U.S. 123 (1968).

Defendant and Becerra. The government then presented its evidence in regard to the statement attributable to Mieres. Closing argument ensued and the jury returned its verdict.

3. On March 24, 1989, all defendants were convicted on all counts.

4. On June 15, 1989, all defendants were sentenced by this Court. Defendant, who did not appear on the specified date, was sentenced in absentia. All defendants received the identical sentence of two hundred thirty-five months.

5. On June 7, 1990, Defendant filed his Motion to Vacate Sentence and for Resentencing. Pursuant to a hearing held before this Court on October 11, 1990, Defendant's motion was granted. A written order was entered by this Court on October 12, 1990. Defendant's resentencing is now scheduled before this Court on January 11, 1991.

6. The co-defendants proceeded with their appeals after sentencing. On December 18, 1990, the Court of Appeals entered a written, published order with an opinion by which the convictions as to co-defendant Becerra-Flores were reversed.[2] Co-defendant Becerra-Flores is situated identically to Defendant in regard to the case before this Court.

7. In *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990)[3], [1990 U.S. Ap. LEXIS 21715] the

[2] The convictions as to co-defendant Mieres-Borges were affirmed.

[3] A copy of the referenced opinion is attached hereto as Exhibit "A".

Appellate Court found as a matter of law that the evidence presented at trial was insufficient to establish the guilt of Becerra beyond a reasonable doubt and reversed his conviction as to both counts. *Id.* at p. 2.[4] As to the conspiracy count, the Appellate Court stated:

> "From the evidence presented at trial against Becerra-Flores, however, we are not convinced that the government met its burden by establishing the existence of a conspiratorial agreement beyond a reasonable doubt. No evidence showed that Becerra-Flores ever entered into an agreement with any other defendant to distribute cocaine. Furthermore, Becerra-Flores was not shown to have committed any acts which would further such a conspiracy." *Id.* at 8.

8. As to the substantive count, the Appellate Court continued:

> "Similarly, we believe that the government failed to establish, by and through the evidence presented against Becerra-Flores, that he did in fact possess cocaine with the intent to distribute. Becerra-Flores was never shown to be in actual possession of any of the bails [sic] of cocaine discovered on the beach at Cay Sal. Constructive possession was also never established by the government at trial. It is simply not clear beyond a reasonable doubt that Becerra-Flores had a knowing power or right to exercise dominion and control over the bails [sic] of cocaine. Becerra – Flores was never seen on the

[4] For ease of reference to the attached opinion from LEXIS, indicated page numbers refer to those on the upper right hand corner of the referenced exhibit.

beach but the bails [sic] of cocaine; **in fact, none of the Defendants aboard the Wilfred were seen with the cocaine.** No evidence was presented which showed that Becerra-Flores **or any other defendant** left the Wilfred and went ashore on Cay Sal. Further, **none of the defendants** was shown to evice [sic] any dominion or control over the beach on which the cocaine was found. There was no other evidence of any attempt to guard the beach or to prevent others from going ashore." *Id.* at 8. (emphasis supplied).

9. As to the appellate record in regard to the instant case, Defendant is situated identically to that of co-defendant Becerra-Flores. Identical evidence was presented by the government as to Defendant and Becerra, they gave closing argument at the same time and the jury returned its verdict as to Defendant and Becerra prior to its having entertained the statement against Mieres-Flores. Finally, there was no additional evidence presented solely against Defendant which would occasion a different result on appellate review. As the Court of Appeals further found:

> "Evidence presented at trial did not reveal which of the defendants was the captain of the Wilfred." *See p. 5, Footnote 9.*

MEMORANDUM OF LAW

The rules of criminal procedure do not demarcate the outer limits of a trial court's authority to vacate a judgment of conviction. Under its inherent supervisory power, a District Court may consider an untimely post-trial Motion for Judgment of Acquittal or may grant such a motion sua sponte to correct manifest error when it

retains jurisdiction over the case. *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989). See also *United States v. Coleman*, 811 F.2d 804, 806-07 (3rd Cir. 1987). The rules must be applied flexibly "to provide for the just determination" of every case and must be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." *DiBernardo, supra.*

Defendant's situation fits the *DiBernardo* criteria. Specifically, although a Motion for Judgment of Acquittal is untimely, it is a matter which appropriately can be addressed by this Court. Presently, jurisdiction lies with this Court as sentencing is scheduled for January 11, 1991. Although the rules of criminal procedure would seem to preclude the instant motion, the demands of simplicity in procedure and the other deliniated [sic] factors warrant that this Court exercise its supervisory powers at this time.

In light of the *Mieres* opinion which reversed all convictions and the fact that Defendant is situated identically to his former co-defendant in every factual respect on the record pertaining to that which ocurred [sic] at trial, Defendant respectfully requests that this Court exercise

its supervisory powers and grant his Motion for Judgment of Acquittal for the reasons cited herein.

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(Certificate Of Service Omitted In Printing)

United States Court of Appeals,
Eleventh Circuit.

Dec. 18, 1990.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roberto MIERES-BORGES and
Osvaldo Becerra-Flores.
Defendants-Appellants.

No. 89-5643.

Appeals from the United States
District Court for the
Southern District of Florida

Before FAY and JOHNSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

FAY, Circuit Judge:

Defendants-appellants Roberto Mieres-Borges and Osvaldo Becerra-Flores appeal their convictions in federal district court for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine and for possession with intent to distribute in excess of five kilograms of cocaine. Both appellants challenge the sufficiency of the evidence to support the jury verdicts against them. Because we find that the evidence presented at trial was insufficient to establish the guilt of Appellant Osvaldo Becerra-Flores beyond a reasonable doubt, we REVERSE his conviction on both counts. Because we find

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

that the evidence presented at trial would allow a reasonable factfinder to conclude that Appellant Roberto Mieres-Borges was guilty beyond a reasonable doubt, we SUSTAIN his conviction on both counts. In the alternative, Appellant Mieres-Borges challenges his conviction on the ground that the weight of the cocaine he possessed was not established at trial beyond a reasonable doubt. Because we find that the government was not required to establish the weight of the cocaine seized as an element of the offenses charged, we SUSTAIN his conviction on this ground as well. Finally, Appellant Mieres-Borges challenges the district court's determination of his base offense level under the United States Sentencing Guidelines. Mieres-Borges maintains that the district court erred in refusing to require proof of the weight of the cocaine beyond a reasonable doubt for purposes of sentencing, and that it erred in refusing to reduce his base offense level by two points for his minor role in the offense. For the reasons that follow, we AFFIRM the refusal of the district court to require proof of the weight of the cocaine possessed by Mieres-Borges beyond a reasonable doubt. In addition, we AFFIRM the district court's refusal to reduce the base offense level of Mieres-Borges under section 3B1.2 of the Sentencing Guidelines.

Procedural History

Appellants Roberto Mieres-Borges and Osvaldo Becerra-Flores were indicted by a federal grand jury as two counts. Count one charged appellants with possession with intent to distribute in excess of five kilograms of cocaine in violation of 46 U.S.C.App. §§ 1903(a) and 1903(g) and 18 U.S.C. § 2. Count two charged appellants

with conspiracy to possess with intent to distribute in excess of five kilograms of cocaine in violation of 46 U.S.C.App. §§ 1903(j) and 1903(g). Appellants and a co-defendant[1] were convicted by a jury on both counts. At a bifurcated trial, the jury first returned a verdict against Becerra-Flores. This verdict was sealed while the government presented additional evidence of a statement made by Mieres-Borges to a criminal investigator for the United States Customs Service. Considering this statement in addition to the evidence already presented against Becerra-Flores, the jury then returned a verdict against Mieres-Borges. Both appellants are currently incarcerated.

Factual History

On the evening of November 7, 1988, a United States Customs Service sensor aircraft[2] was launched from Homestead Air Force Base in response to information that an air drop of narcotics was to take place in the Cay Sal Bank area.[3] While conducting a radar patrol of the area, the pilot, David Sherry, responded to a specific report of an aircraft going over Cuba and flying very low to the

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[1] The co-defendant fled the jurisdiction prior to sentencing and is not a party to this appeal.

[2] The sensor aircraft is equipped with a radar and a forward looking infrared camera for detecting drug traffickers both in the air and on the sea.

[3] The Cay Sal Bank area, and Cay Sal Island, are located midway between the Florida Keys and the island of Cuba.

ground. Arriving at an area just south of Cay Sal, at approximately twenty minutes before dusk, Sherry saw an aircraft circling over a vessel at a very low altitude and dropping bales. The boat was circling in the same manner as the plane and was picking up the bales as they were dropped. Sherry counted twenty bales that were dropped from the plane into the water.

Faced with the choice of whether to pursue the boat or the plane, Sherry followed the aircraft as it travelled west along Cuban airspace. Fearful of an encounter with a Cuban fighter plan, Sherry eventually abandoned his pursuit and returned to the Cay Sal Bank area to look for the vessel. When he returned after 40 minutes, the vessel could not be relocated.

Sherry described the boat as white, 40 to 50 feet in length, with tuna towers and a number of antennas. He admitted at trial, however, that there were numerous boats in the area of southern Florida to the Bahamas matching that description. Further, the evidence at trial showed that the Customs plane was flying at an altitude of 2500 feet[4] and that visibility was not optimal. For these reasons, Sherry was unable to ascertain the name of the vessel.

A second Customs plane was launched to search for the boat at six a.m. the following morning, approximately twelve hours after Sherry first spotted the vessel. When

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[4] The Customs pilot testified that he did not want to fly so low as to be detected by the boat below and thereby risk destruction of any contraband the boat may have been carrying.

he arrived at Cay Sal, the pilot, William Radtke, saw only one boat which resembled the vessel described by Sherry. Radtke described the boat as a 30 to 40 foot sportfishing vessel with a tuna tower, sitting approximately ten feet off of the south beach of Cay Sal. The name of the boat was the "Wilfred" from Miami, Florida.

Radtke left the boat to go to the drop point from the night before and returned to Cay Sal when he didn't see any bales or any other vessels. As he approached Cay Sal, he noticed the Wilfred was underway and heading away from the island with a cover[5] over the back of the transom hiding the name of the boat. The boat was headed toward Cuba, travelling at 30 knots.[6] Radtke then flew over Cay Sal and saw numerous rectangular bales wrapped in white plastic and stacked on the high water mark of the beach.[7] He described a set of roundtrip like footprints leading from the water to where the bales were stacked and back to the water again. The footprints leading to and from the water were in the area where the Wilfred was originally sighted by Radtke.

Radtke admitted at trial that there was a discrepancy between the size of the Wilfred, which he described as 30

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[5] Radtke described the cover as a brown burlap cover or brown rug thrown over the back of the transom.

[6] Thirty knots is the approximate equivalent of thirty-five to thirty-six miles per hour.

[7] Radtke testified that he didn't see the bales on the beach when he made his first sweep over Cay Sal Island. He emphasized, however, that he wasn't at that time looking for anything but the boat spotted the evening before.

to 40 feet in length, and the size of the vessel spotted by Sherry the evening before, which was described as 40 to 50 feet in length. Although Radtke testified that he saw no other boats within a 30-mile radius of the Cay Sal beach where the Wilfred was spotted, he stated that he was conducting only a visual search of the area without the benefit of radar. In addition, Radtke admitted that a boat like the Wilfred could have travelled[sic] 360 miles in the twelve hours between the time that the unidentified boat was spotted by Sherry picking up bales, and the time that the Wilfred was first identified off of Cay Sal. Radtke never saw any contraband aboard the Wilfred.

Radtke radioed Chief Quartermaster Rafael Lewis, of the United States Coat Guard, to intercept the Wilfred. Lewis spotted the Wilfred between nine and nine-thirty a.m. heading toward Cuban territorial waters at a speed of ten to fifteen knots.[8] Lewis contacted the Wilfred by radio and asked a series of standard pre-boarding questions. Lewis first asked what was the Wilfred's latest port of call. The captain of the Wilfred[9] responded three times that they had been at Cayo Blanco.[10] The fourth time[11]

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[8] Ten to fifteen knots is the approximate equivalent of thirteen to eighteen miles per hour.

[9] Evidence presented at trial did not reveal which of the defendants was the captain of the Wilfred.

[10] Cayo Blanco is in Cuban territorial waters.

[11] Lewis testified that he found it unusual for a United States vessel to be inside Cuban territorial waters. For this reason he asked the captain of the Wilfred three times to repeat his answer.

the Captain changed his answer and stated that he had departed Key Largo, Florida. When Lewis asked what the Wilfred's next port of call was, the captain stated that they were headed back to Key Largo. Finally, when Lewis inquired as to the purpose of the Wilfred's voyage, the captain responded that they were fishing. The Coast Guard then boarded the Wilfred to check documentation and compliance with safety regulations. Lewis testified that when asked to point to a position on the nautical chart where he had been fishing, the captain was very vague and didn't pinpoint any particular position. In addition, the captain of the Wilfred kept no nautical log on board that indicated where the Wilfred had been.[12]

A three to four hour inspection of the Wilfred revealed no contraband aboard the vessel. The Wilfred had fishing equipment on board, although the equipment was not rigged. The boat's outriggers were also not rigged. While there were no freshly caught fish on board, there was ice in the fishing box, as well as two unopened containers of bait. There was scuba gear on board, and there were fishing rigs out on deck, which were not baited. A temporary fishing license was found on the vessel, which allowed the Wilfred to fish in American Waters.[13] The Wilfred's captain stated that they were fishing for dolphin.[14]

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[12] Lewis admitted on cross-examination that not all small boats keep such logs.

[13] The license did not allow the Wilfred to fish in Cay Sal or in Cuban waters. When asked if he had been fishing in the Cay Sal Island area, the captain stated that he had not.

[14] The Coast Guard officer acknowledged that because dolphin are migratory, it is impossible to anticipate where they will be before going out to fish for them.

Sufficiency of the evidence

Whether there was sufficient evidence to support a conviction is a question of law subject to de novo review by this Court. Thus, we owe no special deference to findings of the district court. *United States v. Kelly*, 888 F.2d 732-739-40 (11th Cir.1989) (citing *United States v. Pareja*, 876 F.2d 1567, 1568 (11th Cir.1989)). In reviewing the sufficiency of the evidence to support a jury verdict, we must view the evidence in the light most favorable to the government. *United States v. Chotas*, 913 F.2d 897, 898 (11th Cir.1990) (per curiam) (citations omitted). Thus, all reasonable inferences and credibility choices are made in the government's favor. *United States v. Kelly*, 888 F.2d at 740 (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Gregory*, 730 F.2d 692, 700 (11th Cir.1984), *cert. denied*, 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985)).

Accepting all reasonable inferences which support the verdict, we will affirm the conviction " 'if a reasonable trier of fact could conclude that the evidence establishes guilt beyond a reasonable doubt.' " *United States v. Pritchett*, 908 F.2d 816, 820 (11th Cir.1990) (citations omitted); *United States v. Chotas*, 913 F.2d at 898 (citing *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) *(en banc), aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)).[15] It is not necessary "for the government to disprove every reasonable hypothesis of innocence, as the jury is 'free to choose among reasonable

[15] Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in this circuit. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

constructions of the evidence.' " *United States v. Jones*, 913 F.2d 1552, 1557 (11th Cir.1990) (citing *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir.1983) (quoting *United States v. Bell*, 678 F.2d at 549)). All that is necessary is that a reasonable factfinder could conclude that the evidence establishes guilt beyond a reasonable doubt. *United States v. Kelly*, 888 F.2d at 740 (citations omitted).

Therefore, we cannot reverse a conviction for insufficiency of the evidence unless we conclude that no reasonable fact-finder could find proof of guilt beyond a reasonable doubt. *United States. v. Jones*, 913 F.2d at 1557. "If there is a lack of substantial evidence, viewed in the Government's favor, from which a reasonable fact-finder could find guilt beyond a reasonable doubt, the conviction must be reversed." *United States v. Kelly*, 888 F.2d at 740 (citations omitted).

The test for sufficiency of evidence is identical regardless of whether the evidence is direct or circumstantial, and "no distinction is to be made between the weight given to either direct or circumstantial evidence." *United States v. Gonzalez*, 719 F.2d 1516, 1521, (11th Cir.1983), *cert. denied*. 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1984) (citations omitted). "Where the government seeks to meet its burden of proof on the basis of circumstantial evidence, however, it must rely on *reasonable* inferences in order to establish a prima facie case." *United States v. Villegas*, 911 F.2d 623, 628 (11th Cir.1990) (emphasis added).

Osvaldo Becerra-Flores

The only evidence presented at trial against Appellant Becerra-Flores was circumstantial. In order to find Becerra-Flores guilty, therefore, a reasonable factfinder must conclude beyond a reasonable doubt, drawing reasonable inferences from such circumstantial evidence, that the appellant did possess and conspire to possess in excess of five kilograms of cocaine with the intent to distribute. We believe that the evidence presented at trial is insufficient to allow a reasonable factfinder to conclude that Becerra-Flores was guilty beyond a reasonable doubt.

Becerra-Flores was charged both with conspiracy and with the substantive crime of possession. Because evidence of possession would also serve as circumstantial evidence of the existence of a conspiratorial agreement to possess cocaine with the intent to distribute, the facts here must be analyzed with respect to the elements of both crimes.

In order to support a conviction for conspiracy, the government must prove " 'that an agreement existed between two or more people to commit a crime, that the accused had knowledge of at least the essential objectives of that agreement, and that armed with that knowledge, he voluntarily joined or participated in the illegal venture.' " *United States v. Battle*, 892 F.2d 992, 999 (11th Cir.1990) (quoting *United States v. Pantoja-Soto*, 739 F.2d 1520, 1525 (11th Cir.1984), *cert denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985)). The existence of a conspiracy may be established through direct or circumstantial evidence. *United States v. Montes-Cardenas*, 746

F.2d 771, 778 (11th Cir.1984) (citations omitted). Thus, "direct evidence of the elements of a conspiracy is not required. A defendant's knowing participation in a conspiracy may be established through proof of surrounding circumstances such as acts committed by the defendant which furthered the purpose of the conspiracy." *United States v. Bain*, 736 F.2d 1480, 1485 (11th Cir.1984), *cert. denied*, 469 U.S. 937, 105 S.Ct. 340, 83 L.Ed.2d 275 (1984) (citation omitted).

Possession of a controlled substance with intent to distribute may also be shown by either direct or circumstantial evidence. *United States v. Pantoja-Soto*, 739 F.2d at 1525 (citing *United States v. Bustos-Guzman*, 685 F.2d 1278, 1280 (11th Cir.1982) (per curiam)). Furthermore, possession may either be actual or constructive. Constructive possession will be found where there is a " 'knowing exercise of or the knowing power or right to exercise dominion and control over the substance.' " *United States v. Poole*, 878 F.2d 1389, 1392 (11th Cir.1989) (quoting *United States v. Knight*, 705 F.2d 432, 433 (11th Cir.1983)). Even constructive possession need not be exclusive, but may be shown circumstantially through evidence of ownership, dominion, or control over the premises on which the substance is located. *Id.* (citations omitted). "[M]ere presence in the area of contraband or awareness of its location is not sufficient to establish possession." *United States v. Maspero*, 496 F.2d 1354, 1359 (5th Cir.1974).[16]

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[16] The Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

We believe that the evidence presented at trial was insufficient to allow a reasonable factfinder to conclude beyond a reasonable doubt that Becerra-Flores was part of a conspiratorial agreement to possess cocaine with the intent to distribute, or that Becerra-Flores did in fact possess cocaine with the intent to distribute. Most significant to Becerra-Flores' challenge to the sufficiency of the evidence against him, is the requirement that the government prove that the appellants actually entered into an agreement with the purpose of achieving an unlawful objective. *See United States v. DeSimone*, 660 F.2d 532, 537-38 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1732, 72 L.Ed.2d 149 (1982). It is well established that "[i]nferences from the conduct of the alleged participants or from other circumstantial evidence of a scheme may provide the basis for establishing that a conspiratorial agreement existed." *United States v. Pantoja-Soto*, 739 F.2d at 1525 (citations omitted). From the evidence presented at trial against Becerra-Flores, however, we are not convinced that the government met its burden by establishing the existence of a conspiratorial agreement beyond a reasonable doubt. No evidence showed that Becerra-Flores ever entered into an agreement with any other defendant to distribute cocaine. Furthermore, Becerra-Flores was not shown to have committed any acts which would further such a conspiracy.

Similarly, we believe that the government failed to establish, by and through the evidence presented against Becerra-Flores, that he did in fact possess cocaine with the intent to distribute. It is without question that Becerra-Flores was never shown to be in actual possession of any of the bales of cocaine discovered on the

beach at Cay Sal. Constructive possession was also never established by the government at trial. It is simply not clear beyond a reasonable doubt that Becerra-Flores had a knowing power or right to exercise dominion and control over the bales of cocaine. Becerra-Flores was never seen on the beach with the bales of cocaine; in fact, none of the defendants aboard the Wilfred were seen with the cocaine. No evidence was presented which showed that Becerra-Flores or any other defendant ever left the Wilfred and went ashore on Cay Sal. Further, none of the defendants was shown to evince any dominion or control over the beach on which the cocaine was found. There was no evidence of any attempt to guard the beach or to prevent others from going ashore.

This circuit has declared that "[c]onspiracy implies much more than physical proximity to purported co-conspirators; possession entails more than physical proximity to the controlled substance." *United States v. Pantoja-Soto*, 739 F.2d at 1526. Where, as here, the government presents no evidence of the existence of a conspiratorial agreement and no evidence that a defendant did in fact possess a controlled substance with the intent to distribute, it has not met the burden of proof necessary to convict on charges of conspiracy and possession.

We recognize that the evidence presented at trial goes a long way toward establishing the defendants' presence in the area of contraband and their flight from that area when approached by law enforcement officials. We stress, however, that this alone is insufficient to support a finding of guilt beyond a reasonable doubt. It is well beyond question that mere physical presence at the scene of criminal activity is insufficient to support a

finding of guilt. *United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir.1986); *United States v. Pantoja-Soto*, 739 F.2d at 1526. It is also well established that "even presence coupled with flight, without more, does not establish participation in a conspiracy." *See Also United States v. Castro*, 723 F.2d 1527, 1534 (11th Cir.1984); *United States v. DeSimone*, 660 F.2d at 537; *United States v. Lopez-Ortiz*, 492 F.2d 109, 115 (5th Cir.), *cert. denied*, 419 U.S. 1052, 95 S.Ct. 630, 42 L.Ed.2d 647 (1974). Presence and flight must be considered along with other evidence, and the reviewing court should consider whether, under the totality of the circumstances, there is sufficient evidence to support a jury verdict when the facts are viewed in the light most favorable to the government. *United States v. Lopez-Llerena*, 721 F.2d 311, 312 (11th Cir.1983) (Denial of rehearing), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1602, 80 L.Ed.2d 132 (1984) (citing *United States v. Pintado*, 715 F.2d 1501, 1503 (11th Cir.1983); *United States v. Blasco*, 702 F.2d 1315, 1331-32 (11th Cir.), *cert. denied*, 464 U.S. 914, 104 S.Ct. 275, 276, 78 L.Ed.2d 256 (1983)).

We do not believe that sufficient evidence was presented by the government which, in addition to presence and flight, would allow a reasonable factfinder to conclude that Becerra-Flores was guilty beyond a reasonable doubt. The initial description of the vessel spotted picking up bales, given by Customs Service pilot David Sherry, provided only the very general picture of a sportfishing vessel with a tuna tower, antennas and outriggers. In the waters off of the Florida Keys, the Bahamas, and the island of Cuba, however, that general picture would match the characteristics of literally hundreds of boats. When the Wilfred was identified by Customs Service

pilot William Radtke twelve hours later off of Cay Sal Island, it failed to match even the general description given by Sherry the night before. While the vessel spotted by Sherry was described as 40 to 50 feet in length, the Wilfred was later described by Radtke as only 30 to 40 feet in length.

Because Sherry was unable to ascertain the name of the vessel he saw, it is in no way clear that the Wilfred was the boat described by Sherry. Although Radtke stated that the Wilfred was the only boat he saw within a thirty mile radius, any number of boats could have moved in and out of the Cay Sal area in the twelve hours between Sherry's initial sighting and Radtke's identification of the Wilfred. Furthermore, Radtke only conducted a visual search of the Cay Sal area on the morning he spotted the Wilfred. A radar search may have revealed other vessels outside of that 30-mile radius. Finally, while Sherry testified that he counted twenty bales being dropped from the plane into the water, only eleven bales were recovered from the beach on Cay Sal. The fact that nine bales of cocaine were unaccounted for would seem to indicate that another vessel either removed some bales from the beach, or that the vessel which picked up the bales did not deposit all of them on the beach in the first instance. Under either scenario, it becomes even harder to establish a direct connection between the Wilfred and the bales of cocaine.

The chain of events on the morning after Sherry's initial sighting of the vessel taken together present a very suspicious scenario. We do not agree, however, that this suspicious set of facts is sufficient to establish the guilt of Becerra-Flores beyond a reasonable doubt. When Radtke

returned to the beach where he first saw the Wilfred, he noticed that the vessel was underway and heading away from the island with a cover over the back of the transom hiding the name of the boat. Flying over the island, Radtke for the first time noticed bales stacked on the high water mark of the beach, as well as roundtrip footprints leading from the area in the water where the Wilfred had been to the bales and back to the water.

These facts, viewed in the light most favorable to the government, go a long way toward establishing both the Wilfred's presence in an area where contraband was found, as well as its flight from that area. As we have noted, however, other factors have been necessary in order to supplement the inference of guilt provided by presence. *See e.g., United States v. Bergouignan,* 764 F.2d 1503, 1509 (11th Cir.1985) (where, in addition to the defendant's presence next to a vessel containing marijuana, evidence showed that traces of marijuana residue were found on his clothing), *cert denied,* 484 U.S. 1044, 108 S.Ct. 778, 98 L.Ed.2d 864 (1988). The proximity of the Wilfred to the bales of cocaine stacked on the high water mark of Cay Sal Island, therefore, is insufficient as a matter of law to allow a finding of guilt beyond a reasonable doubt.[17]

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[17] We note that even the conclusion that the Wilfred was present in the area where the cocaine was found requires an inference drawn from circumstantial evidence. To be sure, the Wilfred was first signed by Radtke in the same area where he testified that he saw roundtrip footprints leading from the water to where the cocaine was stacked on the beach. No

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We recognize the existence of other facts, in addition to presence and flight, which implicate the defendants' guilt. However, the government did not present enough additional evidence against Becerra-Flores to support a guilty verdict. When questioned by the Coast Guard as to their latest port of call, the captain of the Wilfred changed his answer after being asked to repeat it several times. In addition, while the captain stated that the purpose of the Wilfred's trip was to fish for dolphin, he had difficulty pointing to a particular position on a nautical chart where the vessel had been fishing. While this may constitute suspicious behavior, it does not rise to the level necessary to find a conspiracy to possess cocaine, or possession of cocaine, beyond a reasonable doubt.

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evidence was presented, however, which established that anyone on board the Wilfred ever left the boat to set foot on Cay Sal Island. Radtke never saw anyone on the beach. In addition, there was no physical evidence on the Wilfred, such as sand or water on deck, to indicate that anyone had left the boat, waded to shore, and then returned to the boat. And finally, no evidence was presented that the persons aboard the Wilfred were dressed in wet clothing or that wet clothes were found on board the vessel. Cases in this circuit where presence has served as a basis for establishing guilt have shown a more certain connection between defendants and contraband than exists here. *See United States v. Pantoja-Soto,* 739 F.2d at 1526 (appellants present at a service station where drugs were found in the station's service bay); *United States v. Ceballos,* 706 F.2d 1198, 1202 (11th Cir. 1983) (presence found where shrimping vessel was carrying marijuana); *United States v. Villegas-Rojas,* 715 F.2d 564, 565-66 (11th Cir.1983) (defendants present on vessel carrying marijuana), *cert, denied,*465 U.S. 1104, 104 S.Ct. 1605, 80 L.Ed.2d 135 (1984).

Once the Coast Guard intercepted the Wilfred, a three to four hour inspection of the vessel revealed no contraband aboard. The Wilfred had fishing equipment and scuba gear on board. Although the fishing equipment was not rigged and there were no freshly caught fish on board, there was ice in the fishing box, which contained two unopened boxes of bait. *Compare United States v. Ceballos*, 706 F.2d 1198, 1202 (11th Cir.1983) (where shrimping vessel carrying marijuana lacked any rigging for shrimping, this negated any inference that crew was unaware of marijuana on board and believed the purpose of their trip was to fish); *United States v. Villejas-Rojas*, 715 F.2d 564, 565-66 (where, in addition to the defendant's presence on board a vessel carrying marijuana, evidence showed that the vessel flew no flag, had no home port and had hidden its real name, had attempted to elude the Coast Guard, and had no shrimp, ice or fishing gear on board). Once again, the fact that the fishing equipment on board the Wilfred was unrigged and the boxes of bait were unopened may give rise to an inference that the Wilfred was not, in fact, fishing. This inference will not, however, support a conclusion beyond a reasonable doubt that the persons aboard the Wilfred were part of a conspiracy to possess cocaine with intent to distribute, or that they in fact possessed cocaine with intent to distribute.

Evaluating the sufficiency of evidence to support a criminal conviction often presents the reviewing court with the difficult job of drawing a clear line where none truly exists. The standard of proof which the government must meet, however, is a stringent one, and based upon

the evidence presented at trial, we find that the government has not met this standard. Therefore, because we find that the evidence presented was insufficient to establish the guilt of Osvaldo Becerra-Flores beyond a reasonable doubt, we REVERSE his conviction on both counts.

Roberto Mieres-Borges

Appellant Roberto Mieres-Borges also challenges the sufficiency of the evidence to support his conviction. After closing arguments in the trial of Osvaldo Becerra-Flores, the jury returned a sealed verdict with respect to Becerra-Flores. Additional evidence was then presented against Appellant Roberto Mieres-Borges, which the jury considered in conjunction with the evidence already presented against Becerra-Flores. The jury subsequently found Mieres-Borges guilty on both counts charged in the indictment.

The additional evidence presented against Mieres-Borges consisted of a statement made by Mieres-Borges to a criminal investigator for the United States Customs Service. Mieres-Borges stated that the Wilfred was out fishing when an unknown aircraft overflew their position and began dropping packages. The persons aboard the Wilfred then picked up the packages and put them on the boat. After examining the contents of the packages, they elected to put the packages on a nearby island.

The statement made by Mieres-Borges directly links him to the cocaine found on the beach at Cay Sal, a link which was absent in the evidence presented against Becerra-Flores. In light of this additional evidence, we find that a reasonable factfinder could conclude that

Mieres-Borges was guilty beyond a reasonable doubt of conspiracy to possess cocaine with intent to distribute and of possession of cocaine with intent to distribute.

Mieres-Borges argues, in the alternative, that his conviction must be overturned because the government failed to establish that the weight of the cocaine seized by the law enforcement authorities exceeded five kilograms as charged in the indictment.[18] This argument is without merit. The statute under which Mieres-Borges was convicted, 46 U.S.C.App. § 1903(a),(j),[19] does not specify any

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[18] Mieres-Borges raises this alternative argument by adopting the argument of Appellant Becerra-Flores on the sufficiency of evidence issue. Because we found that there was insufficient evidence to convict Becerra-Flores, it became unnecessary to reach the issue of the weight of the cocaine with respect to Becerra-Flores.

[19] The statute provides that

(a) Vessels of the United States or vessels subject to jurisdiction of the United States.

It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(j) Attempt or conspiracy

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine, or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

46 U.S.C.A.App. § 1903(a), (j) (1989).

quantity or weight of cocaine as an element of the substantive offense. *See United States v. Fuentes*, 877 F.2d 895, 899 (11th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 347, 107 L.Ed.2d 335 (1989); *United States v. Mena*, 863 F.2d 1522, 1529-30 (11th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 109, 107 L.Ed.2d 72 (1989). Thus, it is unnecessary for the government to prove weight or quantity beyond a reasonable doubt. *United States v. Mena*. 863 F.2d at 1530. For the above reasons, therefore, we SUSTAIN the conviction of Roberto Mieres-Borges on both counts.[20]

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[20] We have some cautionary words for two of the counsel appearing in this appeal.

Both in its brief and at oral argument, the government failed to argue that the statement made by Roberto Mieres-Borges provided sufficient evidence to sustain his conviction. When asked specifically at oral argument whether it could present any evidence which would link either of the appellants to the cocaine, beyond that which was presented against Osvaldo Becerra-Flores, the United States Attorney stated that no such evidence existed. A simple reading of the record of the proceedings in the district court would have revealed that the trial was bifurcated and that additional evidence was presented against Mieres-Borges. While we recognize the heavy case load under which the United States Attorney labors, we wish to emphasize the importance of the record to every case, and particularly to cases involving the sufficiency of evidence.

We also note that counsel for Appellant Mieres-Borges adopted the argument of counsel for Appellant Becerra-Flores on the sufficiency of evidence issue. While Rule 28(i) of the Federal Rules of Appellate Procedure certainly allows counsel for one appellant to rely on the argument of counsel for another appellant, this procedure should not be employed for the purpose of deceiving the appellate court. Counsel for Mieres-Borges defended Mieres-Borges at trial in the district

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Application of United States Sentencing Guidelines

Appellant Mieres-Borges challenges the district court's determination of his base offense level under the United States Sentencing Guidelines. Mieres-Borges first maintains that the district court erred in allowing the government to establish the weight of the cocaine for sentencing purposes under a preponderance of the evidence standard. Mieres-Borges asserts that instead, evidence beyond a reasonable doubt was necessary in order to impose sentence for possession of a particular amount of cocaine. We disagree.

The district court found, based upon the weight of the cocaine as established at trial, that Mieres-Borges should be sentenced under a base offense level of 36.[21]

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court, and so was well aware of the statement made by the appellant which constituted additional evidence against him. Yet nowhere in the brief, whether in its statement of procedural or factual history or in its legal argument, and at no time during oral argument, was this evidence mentioned. This was made possible largely because, in light of the adoption of argument under Rule 28(i), counsel for Mieres-Borges focused only on the sentencing issue in his brief and at oral argument. We caution counsel for Mieres-Borges to be more forthright in his presentation of facts and in his argument before this court in the future.

[21] That level is applied where a defendant is convicted with respect to at least 50 kilograms but less than 150 kilograms of cocaine. United States Sentencing Commission. *Guidelines Manual*, § 2D1.1(c)(4) (Nov.1989).

The appellant argues that a base offense level of 32 was mandated[22] because the government failed to establish the weight of the cocaine necessary for application of the higher level. Because we find that the district court need only have applied a preponderance of the evidence standard in determining the weight of the cocaine, we reject appellant's reasoning.

"The Supreme Court has held that the prosecution need not ' "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." ' *United States v. Cross*, 916 F.2d 622, 623 (11th Cir.1990) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 84, 106 S.Ct. 2411, 2415, 91 L.Ed.2d 67 (1986) (citations omitted)). "In determining which facts must be proven beyond a reasonable doubt, the legislature's definition of the elements of an offense controls." *United States v. Cross*, 916 F.2d at 623; *McMillan v. Pennsylvania*, 477 U.S. at 85, 106 S.Ct. at 2415-16. "Thus, the prosecution is only required to prove beyond a reasonable doubt 'all of the elements *included in the definition of the offense* of which the defendant is charged.' " *United States v. Cross*, 916 F.2d at 623 (quoting *McMillan v. Pennsylvania*, 477 U.S. at 84, 106 S.Ct. at 2415, (citation omitted) (emphasis added in *McMillan*). District courts are required by due process to

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[22] That level is applied where a defendant is convicted with respect to at least 5 kilograms but less than 15 kilograms of cocaine. United States Sentencing Commission, *Guidelines Manual*, § 2D1.1(c)(6) (Nov.1989).

make factual determinations at sentencing only by a preponderance of the evidence. *United States v. Ignacio Munio*, 909 F.2d 436, 439 (11th Cir.1990); *United States v. Alston*, 895 F.2d 1362, 1372-73 (11th Cir.1990).

Again, the statute under which Mieres-Borges was convicted does not include weight or quantity as an element of the offense. Therefore, the district court was only required to determine the weight of the cocaine by a preponderance of the evidence for purposes of sentencing. The district court judge found that the weight of the cocaine as established at trial was over three times that required for application of a base offense level of 36.[23] This weight was established through the testimony of a Drug Enforcement Administration agent, who testified that he lifted six or seven of the eleven bales and found them to weigh at least five kilograms each. In addition, evidence of a logbook entry from the drug storage warehouse listed the weight of the cocaine seized as 605 pounds, or 275 kilograms. We believe that this evidence was sufficient to establish, by a preponderance of the evidence, the weight of the cocaine. Accordingly, we AFFIRM the district court's application of a base offense level of 36 to Roberto Mieres-Borges.

Finally, Mieres-Borges challenges the refusal of the district court to allow a two level reduction in his base offense level based on his minor role in the offense. We have held that a district court's determination of a defendant's role in an offense is a finding of fact to which the

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[23] The judge found that it was established at trial that there were 275 kilograms of cocaine on the beach at Cay Sal.

clearly erroneous standard is applied. *United States v. Carrillo*, 888 F.2d 117, 118 (11th Cir.1989) (per curiam) (citations omitted). The district judge found no evidence that Mieres-Borges was any less culpable than his co-defendants. Because we do not find this conclusion to be clearly erroneous, we AFFIRM the district court's denial of a two point reduction in the base offense level of Roberto Mieres-Borges, under section 3B1.2 of the Sentencing Guidelines.

Conclusion

For the above reasons, we hereby REVERSE the conviction of Appellant Osvaldo Becerra-Flores on both counts. We SUSTAIN the conviction of Appellant Roberto Mieres-Borges on both counts and AFFIRM the district court's application of the United States Sentencing Guidelines to Mieres-Borges.

JOHNSON, Circuit Judge, dissenting:

I dissent. Though I agree with the majority that the evidence was insufficient to justify convicting defendant Becerra-Flores, I cannot agree that the addition of Mieres-Borges' post-arrest exculpatory statement tips the scales so far in favor of conviction that we can conclude that the jury could reasonably find Mieres-Borges guilty beyond a reasonable doubt.

"Reasonable doubt" is defined "in terms of the kind of doubt that would make a person hesitate to act." *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 138, 99 L.Ed. 150 (1954). Our Circuit has defined the exacting standard of "beyond a reasonable doubt" as

"proof of a 'convincing character' sufficient to justify reliance 'without hesitation' in the conduct of one's 'most important affairs.'" *United States v. Jones*, 663 F.2d 567, 571 (5th Cir. Unit B 1981) (quoting jury charge approved of in that case). The prosecution has the burden of proving "beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977). The crime of possession with intent to distribute with which Mieres-Borges was charged requires that the prosecution show, by proof of such convincing character that it justifies the jury's reliance upon it without hesitation, three essential elements: "(1) knowing (2) possession of a controlled substance (3) with intent to distribute it." *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983); *see also* 46 U.S.C.A.App. § 1903(a) (proof of violation of this statute, with which Mieres-Borges was specifically charged, also requires that the crime occur on board a vessel). To prove the crime of conspiracy, the government must prove by the same standard three more essential elements: (1) "an agreement existed between two or more people to commit a crime," (2) "the accused had knowledge of at least the essential objectives of that agreement," and (3) "armed with that knowledge, he voluntarily joined or participated in the illegal venture." *United States v. Pantoja-Soto*, 739 F.2d 1520, 1525 (11th Cir.1984), *cert. denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985).

Our standard for reviewing the sufficiency of the evidence requires us to reverse the conviction if "there is a lack of substantial evidence . . . from which a reasonable factfinder could find guilt [without hesitation]." *United States v. Kelly*, 888 F.2d 732, 740 (11th Cir.1989). While the factfinder need not exclude every reasonable hypothesis of innocence, the evidence must be declared insufficient "where such evidence is wholly consistent with an obvious and reasonable innocent interpretation." *Id.* Rather than demonstrating guilt, Mieres-Borges' exculpatory statement more sensibly implicates an innocent explanation of what the defendants were doing in proximity to the cocaine. The defendants were in the area; an unfamiliar plane flew overhead dropping packages; they fished them out of the water and examined them; they decided to get rid of them by stacking them on the beach.

Mieres-Borges' explanation goes a long way toward explaining some of the peculiarities of this case. First, on the evening of November 7th the customs pilot observed the smugglers' plane drop at least twenty bales, but only eleven were found on the beach. If the defendants picked up some of these bales out of curiosity, it would make sense that once they realized that the bales contained contraband and began to appreciate the consequences of their possession of the bales they would not pursue the remaining ones. Second, there was testimony at trial by the agents that, in the twelve hours between the sighting of the boat on the evening of November 7th and the sighting the next morning, the defendants' boat could have traveled hundreds of miles. But the pilot spotted the boat on the morning of the 8th only 30 miles from the drop site. If the defendants were the smugglers, it makes no sense that they would stay in the area of the drop site, waiting for law enforcement officers to discover them. Though they may not have known that they had been observed on the evening of the 7th, it still is not typical

criminal behavior to dally at the scene of the crime for twelve hours. Third, it remains unclear why the defendants, if they were actually the smugglers, would have left the cocaine in plain view on the beach, totally unprotected. Though Cay Sal Bank is an undeveloped island, there was testimony that it is a popular fishing and diving spot. It seems that the true smugglers would be very interested in protecting and concealing their investment. But the Coast Guard did not even find a weapon on board the defendants' boat. Fourth, though the agent testified that Mieres-Borges told him in his post-arrest statement that the defendants had examined the packages, there was no evidence that the defendants ever opened any of the packages. On cross-examination the agent clarified that Mieres-Borges had merely stated that they had examined the packages and then decided to put them on the beach. Mieres-Borges apparently did not say that he opened any of the packages. The government did not show that any of the bales found on the beach had been opened. Moreover, there was testimony that the Coast Guard did not find even any residue of cocaine on the boat in spite of an extensive search. If the defendants had opened a package, as drug dealers normally would for testing upon receipt of a delivery, then there surely would have been some residue to be found somewhere on board. In sum, the most reasonable conclusion in this case is that the defendants were not the intended recipients of the dropped bales.

The government did not meet its burden in presenting evidence on each element of the charges which would allow a jury to convict beyond a reasonable doubt or "without hesitation." The exculpatory statement did in

fact link Mieres-Borges to the cocaine, as the majority points out, thus showing he had been in possession of it. But the government never put on any direct evidence showing intent to distribute. The crime of possession with intent to distribute may be proven through circumstantial evidence. *Vera*, 701 F.2d at 1357. But here, where there is a reasonable and innocent explanation of the circumstances, to infer intent is simply too long a leap. This is a leap which surely cannot be made "without hesitation." Likewise, the evidence of a conspiracy was totally circumstantial. Though proof of conspiracy by circumstantial evidence is also permissible under *Vera*, and many other cases, it is a long leap to conclude that there existed an agreement between the three defendants and that Mieres-Borges knew the essential objectives of the conspiracy. In sum, Mieres-Borges' exculpatory statement seems to make at least as much sense out of the evidence as the conclusion that the defendants were smuggling drugs. The standard of "beyond a reasonable doubt" is an exacting one. I cannot say that a jury could find "without hesitation" that the government has proven each of the elements of these crimes. I therefore would hold the evidence against Mieres-Borges to be insufficient. Consequently, I would not reach the sentencing issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(Caption Omitted In Printing)

CASE NUMBER:

88-10035-CR – KING

Transcipt [sic] of proceedings before the Honorable James Lawrence King, Chief United States District Judge, at Miami, Florida, on the 11th day of January, 1991.

[2] THE COURT: All right. Be seated, please.

Let's see. This would be Mr. Abrams and Mr. Oosterbaan on U.S. versus Ortega-Rodriguez.

MR. ABRAMS: Yes, your Honor. Good morning.

MR. OOSTERBAAN: Good morning. Your Honor.

THE COURT: Mr. Abrams, you have filed a motion for judgment of acquittal. Is this timely?

MR. ABRAMS: Judge, pursuant to United States versus DeBernardo, 880 Fed. 2nd 1216, 1989, 11th Circuit case, we believe that it is.

Specifically on page 1225 of that opinion, footnote 4 as quoted in our memorandum, the rulings of criminal procedure of course do not demarcate the outer limits of a trial court's authority to vacate a judgment of conviction. Under its inherent supervisory power a District Court may consider an untimely motion, or may grant such motion when it retains jurisdiction over the case.

The rules must be applied to provide for the just determination of every case and must be construed to secure simplicity and procedural fairness in administration and the limitation of unjustifiable expense and delay.

Consequently, pursuant to this Court's supervisory powers, we believe that the Court can entertain a motion pursuant to rule 29 C at this time.

THE COURT: Mr. Oosterbaan.

[3] MR. OOSTERBAAN: Your Honor, the government first states that the case cited by the defense is not support for what it requests in this case. The case itself stands for a ruling on a rule 33, not a motion for judgment of acquittal.

The footnote that is cited does cite other circuit authority for such motions. But once again the case in the 11th Circuit does not stand for that proposition.

Second of all, and most importantly, this defendant as your Honor is aware will not be entitled to an appeal. So his request for relief is based on an appeal that a codefendant was rightly entitled to. He is is [sic] not entitled to such an appeal.

So he would be gaining a benefit when the case law suggests that he is not entitled to that benefit. Under policy and long standing case law he is not entitled to appeal and he should not derive benefit as his codefendant did.

That is not conceding that the motion should be granted on the merits to begin with.

THE COURT: I think the law is rather clear when a person becomes and remains a fugitive he waives his right to appeal. I don't know much that I can do for him at this time.

The motion is denied.

I am inclined under the circumstances to not penalize him beyond what the minimum mandatory requirement of law is.

Let's see. According to the pre sentence investigation report, the minimum sentence is one hundred and 88 to 2 hundred [4] 35 months. Although there has been a recommendation by the probation officer for a higher amount, it would seem to me to be appropriate to sentence him to the lower range, although I have not heard from either of you. And I would not penalize him in this case.

Now, how does he compare with the other defendants on this? Let me invite counsel for the defense to address that point.

Where does he fit into this? I should treat him fairly with the others, but –.

MR. ABRAMS: Judge, your Honor sentenced all 3 defendants identically on June 15, 1989. And each received the sentence of 2 hundred 35 months.

However, we would point out that in the PSI there are distinctions drawn, say, between Mr. Ortega and Mr. Bessara in that Mr. Bessara is classified in the PSI of having been the captain of the Wilfred.

THE COURT: Is there any reason why he should not be sentenced to the lower end of the guidelines? He has another conviction on a bail jumping but he should not be penalized on this case for that.

MR. OOSTERBAAN: The government doesn't take a position on that. We think your first sentence in this case was appropriate.

THE COURT: I am inclined to sentence him to the lower end of the guideline.

[5] MR. ABRAMS: Without waiving any argument that we have raised right now in regard to the propriety of the conviction at this point, I would urge your Honor, and I did not raise this before this moment with probation, but frankly this is beausc I didn't even know of the opinion until approximately the day before I filed the motion for judgment of acquittal.

Pursuant to 5K1 point zero of the sentencing guideline, this Court can depart downward based on circumstances which were not taken into consideration by the sentencing commission in formulating the guidelines.

THE COURT: I am not going do [sic] do that. I think that in sentencing him to one hundred 88 months I am doing as much for him as I am inclined to do.

Jose Antonio Ortega it is ordered and adjudged that you be remanded to the custody of the Attorney General of the United States or the Bureau of Prisons for a period of one hundred 88 months, five years supervised release and one hundred dollar assessment. The defendant is remanded to the custody of the United States Marshal.

Gentleman, I am going to have to take a brief recess for a few minutes and I will be back with you on the next sentencing.

(Court in recess)

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA V. JOSE ANTONIO ORTEGA RODRIGUEZ (33156-004)	**JUDGMENT IN A CRIMINAL CASE** **(For Offenses Committed On or After November 1, 1987)** Case Number: 88-10035-CR-KING

(Name of Defendant) /s/ Stewart Abrams, AFPD
Defendant's Attorney

THE DEFENDANT:

___ pleaded guilty to count(s) _____ .

_x_ was found guilty on count(s) One and Two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involved the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
46:1903(a)(g) 18:2	Possession with intent to distribute cocaine		One
46:1903(j)(g)	Conspiracy to possess with intent to distribute		Two

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

x It is ordered that the defendant shall pay a special assessment of $100.00, for count(s) One and Two, which shall be due x immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
591-48-0871

Defendant's Date of Birth:
09-25-63

Defendant's Mailing Address:

In custody

Defendant's Residence Address:

In custody

January 11, 1991
Date of Imposition of Sentence

JAMES LAWRENCE KING
Signature of Judicial Officer

JAMES LAWRENCE KING,
Chief Judge
Name & Title of Judicial Officer

January 11, 1991
Date

Defendant: JOSE ANTONIO ORTEGA RODRIGUEZ
Case Number: 88-10035-CR-KING

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED EIGHTY EIGHT (188) MONTHS, to run concurrently.

___ The court makes the following recommendations to the Bureau of Prisons:

x The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ a.m.
___ at _____ p.m. on _____.
___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____.
___ as notified by the United States marshal.
___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment–Page 3 of 3

Defendant: JOSE ANTONIO ORTEGA RODRIGUEZ
Case Number: 88-10035-CR-KING

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

___ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-10035-Cr-KING

(Caption Omitted In Printing)

NOTICE OF APPEAL

Notice is hereby given that Jose Antonio Ortega Rodriguez, the Defendant above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Final Judgment entered in this action on the 23rd day of January, 1991.

JAMES R. GAILEY
FEDERAL PUBLIC
DEFENDER

By: /s/ Stewart G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
Florida Bar No. 371076
301 North Miami Avenue
Miami, Florida 33128
(FTS) 350-6900
(305) 536-6900

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA

V.

JOSE ANTONIO ORTEGA RODRIGUEZ
(33156-004)

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number:
90-398-
CR-KING

/s/ Yolanda Morales, Esq.
Defendant's Attorney

THE DEFENDANT:

___ pleaded guilty to count(s) _____ .

_x_ was found guilty on count(s) One and Two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involved the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:401(3)	Contempt of court		One
18:3146	Failure to appear		Two

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____ , and is discharged as to such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

_x_ It is ordered that the defendant shall pay a special assessment of $100.00 , for count(s) One and Two , which shall be due _x_ immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
591-48-0871

Defendant's Date of Birth:
09-25-63

Defendant's Mailing Address:

In custody

Defendant's Residence Address:

In custody

April 12, 1991
Date of Imposition of Sentence

/s/ James Lawrence King
Signature of Judicial Officer

JAMES LAWRENCE KING,
Chief Judge
Name & Title of Judicial Officer

April 15, 1991
Date

Judgment–Page 2 of 3

Defendant: JOSE ANTONIO ORTEGA-RODRIGUEZ
Case Number: 90-398-CR-KING

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWENTY-ONE (21) MONTHS as to Counts One and Two to run concurrently to each other. The sentence imposed in Case No. 90-398-CR-KING shall run consecutively to the sentence imposed in Case No. 88-10035-CR-KING.

___ The court makes the following recommendations to the Bureau of Prisons:

xx The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ at _____ a.m. / p.m. on _____ .

___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

___before 2 p.m. on _____ .

___as notified by the United States marshal.

___as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment–Page 3 of 3

Defendant: JOSE ANTONIO ORTEGA RODRIGUEZ
Case Number: 90-398-CR-KING

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the

term of supervised release. The defendant shall comply with the following additional conditions:

___ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5643

D.C. Docket No. 88-10035-CR-JLK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO MIERES-BORGES,
OSVALDO BECERRA-FLORES,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

Before FAY and JOHNSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction of appellant Osvaldo Becerra-Flores on both counts is hereby REVERSED; the judgment of conviction of appellant Roberto Mieres-Borges on both counts is

hereby SUSTAINED; and the sentence imposed by the District Court as to appellant Mieres-Borges is hereby AFFIRMED.

JOHNSON, Circuit Judge, dissented and filed an opinion.

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Entered: December 18, 1990
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: MAY 1, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5083

UNITED STATES OF AMERICA,

Appellee,

- versus -

JOSE ANTONIO ORTEGA-RODRIGUEZ,

Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MOTION TO DISMISS APPEAL AND MOTION
TO EXTEND TIME FOR BRIEFING
SCHEDULE PENDING DECISION ON
MOTION TO DISMISS

DEXTER W. LEHTINEN
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LINDA COLLINS HERTZ
Chief, Appellate Division

ANDREW G. OOSTERBAAN
Assistant United States Attorney

Of Counsel

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

District Judge	:	Hon. James L. King
Magistrate	:	Hon Hugh J. Morgan
Attorneys	:	Dexter W. Lehtinen United States Attorney
		Odilio M. Diaz, Andrew G. Oosterbaan, Assistant United States Attorneys
		James R. Gailey, Federal Public Defender
		Stewart G. Abrams, Assistant Federal Public Defender
Parties	:	Jose Antonio Ortega-Rodriguez

/s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
Assistant United States Attorney

AGO:jn

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5083
(D. Ct. No. 88-10035-CR-KING)

UNITED STATES OF AMERICA,
Appellee,

v.

JOSE ANTONIO ORTEGA-RODRIGUEZ,
Appellant.

MOTION TO DISMISS APPEAL AND MOTION TO EXTEND TIME FOR BRIEFING SCHEDULE PENDING DECISION ON MOTION TO DISMISS

Appellee United States of America moves to dismiss the appeal of appellant Jose Antonio Ortega-Rodriguez.

INTRODUCTION AND FACTS

1. On March 24, 1989, appellant Jose Antonio Ortega-Rodriguez was found guilty of conspiring to possess with intent to distribute and possession with intent to distribute cocaine on board a United States registered vessel, in violation of Title 46 United States Code, Sections 1903(a), (g) and (j), and Title 18 United States Code, Section 2 (R1:61)

2. The trial court scheduled appellant's sentencing for June 15, 1989, at 9:00 a.m., and gave appellant both oral and written notice of the sentencing date (R1:65).

3. Appellant failed to appear for his sentencing (R1:77), and became a fugitive from justice (R1:79). He

was sentenced in absentia to a period of incarceration of 235 months (R1:81).

4. On May 24, 1990, after being a fugitive for almost one year, appellant was arrested (R1:100).

5. On June 21, 1990, appellant was indicted for contempt of court and for failing to appear for sentencing.[1]

6. On January 7, 1991, appellant was found guilty of both counts in the indictment.

7. On appellant's motion, his sentence imposed on June 15, 1989, was vacated by the District Court on October 12, 1990 (R1:104; 112). Subsequently, on January 11, 1991, appellant was resentenced by the District Court to a period of incarceration of 188 months (R1:119; 120).

8. Appellant then appealed (R1:121).[2]

SUMMARY OF THE ARGUMENT

In his appeal, appellant argues that this Court's decision in *United States v. Mieres*, 919 F.2d 652 (11th Cir. 1990), wherein a co-defendant's conviction was reversed

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[1] The district court case number for this case is 90-398-Cr-King. The appeals court number is unknown.

[2] The record on appeal for case no. 91-5083 consists of three volumes. The volumes are numbered and designated one through three. Volume one contains the pleadings, motions and other papers. Volume two is the transcript of the sentencing proceedings on June 15, 1990. Volume three is the transcript of the sentencing hearing on January 11, 1991.

for insufficient evidence, should lead this Court to similarly reverse appellant's conviction. Appellant asserts that the evidence presented against him was identical to the evidence against co-Defendant Becerra, whose conviction was reversed. Notably, appellant mentions nothing of his flight after conviction which places him in an entirely different appellate posture.

According to well-settled precedent in this Circuit, appellant is precluded from raising trial issues, such as insufficient evidence, on appeal. By fleeing and becoming a fugitive after his conviction and prior to sentencing, appellant waived his right to appeal from his conviction. Therefore, he is not entitled to benefit from the properly preserved appellate rights of his co-defendant.

ARGUMENT

APPELLANT, WHO BECAME A FUGITIVE AFTER BEING CONVICTED BY A JURY AND BEFORE SENTENCING, CANNOT NOW CHALLENGE HIS CONVICTION ON APPEAL.

In *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982) *cert. denied*, 460 U.S. 1015, 1035 Cr. 1259 (1983), this Court held "that a defendant who flees after conviction but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." *See also United States v. London*, 723 F.2d 1538 (11th Cir. 1984).

Appellant fled after his conviction and before his sentencing (R1:134), and for almost one year was a fugitive from justice. Under the holding in *Holmes*, he cannot

now challenge his 1989 conviction for conspiracy and possession with intent to distribute cocaine. Likewise, appellant is not entitled to benefit from the properly preserved rights of appeal exercised by his co-defendant.

Accordingly, appellant is precluded from raising the issues cited on appeal. This Court should, therefore, dismiss his present appeal.

CONCLUSION

According to well-established case law, appellant Jose Antonio Ortega-Rodriguez is precluded from appealing his conviction. Consequently, this Court should dismiss his appeal. Additionally, appellee respectfully requests that this Honorable Court extend the time for the briefing schedule pending a decision on appellee's Motion to Dismiss Appeal.

Respectfully submitted,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

By: /s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
ASSISTANT UNITED STATES
ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of May, 1991, to Stewart G. Abrams, Esquire, Assistant Federal Public Defender, Attorney for Appellant, 301 North Miami Avenue, Miami, Florida 33128.

/s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
ASSISTANT UNITED STATES
ATTORNEY

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-5083

(Caption Omitted In Printing)

APPELLANT'S RESPONSE TO GOVERNMENT'S MOTION TO DISMISS APPEAL AND MOTION TO EXTEND TIME FOR BRIEFING SCHEDULE PENDING DECISION ON MOTION TO DISMISS

Appellant Jose Antonio Ortega Rodriguez (hereinafter "Defendant"), through counsel, respectfully responds to and opposes the government's motion to dismiss his appeal.

STATEMENT OF FACTS

Initially, Defendant does hereby adopt and incorporate by reference the statement of facts as delineated in his brief which was filed on April 24, 1991.[1] In his brief, Defendant respectfully urges this Court to adopt its ruling in *United States v. Mieres*, 919 F.2d 652 (11th Cir. 1990) which essentially is the instant case. In addition, Defendant points out several factual inaccuracies in the government's motion.

---

[1] Notably, the government has waited until May 14, 1991, or just ten days prior to the due date of its answer brief to file the instant motion. Defendant's notice of appeal was filed on January 18, 1991.

First, the government relates that "the trial court scheduled Appellant's sentencing for June 15, 1989, at 9:00 a.m., and gave Appellant both oral and written notice of the sentencing date. (R1-65)." In fact, notice of sentencing date was mailed by the Court on June 15, 1989, (for 1:30 p.m.) and was issued to the counsel. At no time did Defendant receive oral notice of the sentencing date from the District Court. In addition, in making reference to Defendant's brief, the government alleges:

> Appellant asserts that the evidence presented against him was identical to the evidence against co-defendant Becerra, whose conviction was reversed. Notably, Appellant mentions nothing of his flight after conviction which places him in an entirely different appellant posture.

See Government's Motion to Dismiss, pp. III and IV

In fact, defendant specifically referenced in his brief that he was sentenced *in absentia* by the District Court and that an arrest warrant was issued. *See* Defendant's Brief, p.2. In addition, Defendant reiterates that the evidence presented by the government **at trial** as to him was identical to that which was introduced against co-defendant Becerra. Defendant's status after the return of the jury verdict in no way alters the evidence which was presented to and entertained by the jury in consideration of the instant matter.

Finally, on January 7, 1991, Defendant was found guilty of contempt of court and failure to appear for sentencing in violation of Title 18, United States Code, Sections 401(3) and 3146 respectively. The referenced case arose out of Defendant's conduct attributable to the

instant case. On April 15, 1991, Defendant was sentenced by the Honorable James Lawrence King to the custody of the Bureau of Prisons for a term of twenty-one months as to each of the referenced counts, said sentence to run consecutively to that which was imposed in the instant case.[2] (Please see attached Exhibit "A").

MEMORANDUM OF LAW

Defendant acknowledges the prevailing case law in this circuit whereby this Court may dismiss an appeal due to apparent flight of the Appellant. *See United States v. London*, 723 F.2d 1538 (11th Cir. 1984); however, the Court also retains discretion to entertain an appeal in appropriate cases despite the Defendant's flight. *See United States v. Matista*, 1991 W.L. 74711 (2nd Cir. decided May 10, 1991). *See also United States v. Persico*, 853 F.2d 134 (2nd Cir. 1988) ("There is no constitutional defect in a policy of dismissing the appeals of fugitive defendants even after their recapture . . . of course, we remain mindful that 'we have discretion to reach the merits in an appropriate case.' ")

Defendant respectfully urges this Court to find that the instant matter is an "appropriate case". The identical evidence which was presented as to co-defendant Becerra simultaneously was introduced against Defendant. this Court has determined that the evidence presented at trial against Becerra was insufficient as a matter of law to warrant conviction for the crimes charged. *Mieres, supra.*

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[2] Presently, Defendant is serving a sentence of 188 months as to the instant case.

Second, and most significantly, by separate proceeding and conviction, Defendant has been punished for his failure to appear at sentencing by having received a sentence of twenty-one months of incarceration. Co-defendant Becerra, who at trial was in a factually identical posture to Defendant, has been discharged from custody by Order of December 21, 1990. (R1-115). Based on *identical* trial evidence, Defendant presently is serving a sentence of one hundred eighty-eight months of incarceration.

Finally, one of the reasons that courts have determined that a Defendant who becomes a fugitive has waived his right to appeal until he is recaptured is that if a Defendant's appeal was successful, it would place an unfair burden on the government since witnesses or other evidence may become unavailable. *See United States v. Baccollo,* 725 F.2d 170 (2nd Cir. 1983). The instant case presents no such retrial problem whereas a ruling from this Court which is consistent with the *Mieres* decision, would result in a dismissal as opposed to a retrial.

CONCLUSION

In sum, by its motion, the government seeks to have Defendant serve a sentence in excess of fifteen years of incarceration beyond the penalty for jumping bond because he failed to appear for sentencing. He has been sentenced to twenty-one months for his failure to appear and is cognizant that any term of incarceration would have been minimal had he been present on the sentencing date. Defendant urges this Court to exercise its discretion and not dismiss the instant appeal whereas this Court is

in the extremely rare posture of having litigated previously the merits of the precise issues of which Defendant seeks redress and determined that the proof to substantiate the lengthy term of incarceration imposed was insufficient as a matter of law.

WHEREFORE Defendant respectfully requests that the government's motion to dismiss be denied.[3]

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

By: /s/ Steward G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
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301 North Miami Avenue
Miami, Florida 33128
(FTS) 350-6900

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was mailed this 21st day of May, 1991, to Andrew Oosterbaan, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

/s/ Stewart G. Abrams
Steward G. Abrams

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[3] As an alternative to an immediate ruling on the instant motion, and in the interests of judicial economy, Defendant respectfully suggests that this Court carry the instant issue with the appeal so that the merits of this motion may be addressed more fully in the briefs and potentially, at the time of oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5083

(Caption Omitted In Printing)

On Appeal from the United States
District Court for the Southern District of Florida

BEFORE: KRAVITCH, HATCHETT and CLARK, Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss is GRANTED.

Appellee's motion to extend time for briefing schedule pending decision on motion to dismiss is DENIED as moot.

Filed July 19, 1991

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-5083

(Caption Omitted In Printing)

MOTION TO REINSTATE APPEAL
AND FOR RECONSIDERATION OF ORDER
GRANTING APPELLEE'S MOTION TO DISMISS

Defendant-Appellant Jose Antonio Ortega-Rodriguez (hereinafter "Defendant"), through counsel and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully moves for reinstatement of his appeal and for reconsideration of the order which granted appellee's Motion to Dismiss, and as grounds therefore says:

1. Defendant, along with two co-defendants, was charged by indictment with possession with intent to distribute in excess of five kilograms of cocaine on board a United States registered vessel and with conspiracy to commit the aforesaid act, in violation of Title 46, United States Code Appendix, Sections 1903(a) and (j) respectively.

2. On March 20, 1989, Defendant and his co-defendants proceeded to trial. The trial was bifurcated since co-defendant Mieres-Borges made an inculpatory statement while Defendant and co-defendant Becerra-Flores remained silent. Consequently, the jury heard evidence as to all defendants without Mieres inculpatory statement and then deliberated as to Defendant and Becerra-Flores.

After delivering a verdict which was sealed by the District Court, the jury then entertained evidence pertaining to Mieres-Borges' statement. Jury deliberation again took place and a verdict was returned accordingly. On March 24, 1989, all defendants were found guilty as to both charges. Defendant was permitted to remain on bond pending sentencing.

3. On April 24, 1989, or one month after the verdict was returned, an order was entered whereby a sentencing date was scheduled.

4. On June 22, 1989, Defendant, over defense objection, was sentenced *in absentia* by the District Court to a term of imprisonment of two hundred and thirty-five months as to Counts I and II to be served concurrently. This period of supervision was to be followed by a five-year term of supervised release. In addition, a special assessment of one hundred dollars was imposed.

5. On or about May 25, 1990, Defendant was arrested and remanded to the custody of the United States Marshal. Shortly thereafter, i.e. on June 7, 1990, Defendant filed his Motion to Vacate Sentence and for Resentencing. This motion was granted by the District Court.

6. Between June 22, 1989, and May 25, 1990, i.e. the date on which Defendant was sentenced *in absentia* and the date on which Defendant was arrested and remanded to the custody of the United States Marshal, the co-defendants appealed their convictions to this Court. On December 18, 1990, this Court reversed the conviction of co-defendant Becerra-Flores who, in a factual context, was situated identically to Defendant in terms of the trial

record in the instant case. *See United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990) (Appended hereto as Appendix "A").

7. On January 9, 1991, Defendant filed his motion for judgment of acquittal based on the *Mieres* decision. This motion was denied by the District Court on January 11, 1991, whereupon Defendant was sentenced to the custody of the Bureau of Prisons for a term of one hundred and eighty-eight months as to Counts I and II. This term was to be followed by a five-year period of supervised release.

8. On January 28, 1991, Defendant filed his Notice of Appeal. Subsequently, Defendant submitted his appellate brief on April 24, 1991.

9. On May 15, 1991, or in excess of three months after Defendant filed his Notice of Appeal after Defendant prepared his brief, the government moved to dismiss the appeal and to extend time for briefing schedule pending decision on Motion to Dismiss. Citing *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983), and *United States v. London*, 723 F.2d 1538 (11th Cir. 1984), the government argued essentially that because Defendant fled after conviction but before sentencing, he waived his right to appeal unless he could establish that his absence was due to matters completely beyond his control.

10. On May 21, 1991, Defendant responded to the government's motion. Although Defendant recognized as precedent the cases cited by the government, Defendant urged this Court to follow and adopt *United States v. Matista*, 932 F.2d 1055 (2nd Cir. 1991) and *United States v.*

Persico, 853 F.2d 124 (2nd Cir. 1988). Although the referenced cases provide that there is no constitutional infirmity to dismissal of an appeal for a fugitive defendant after recapture, courts retain the discretion to reach the merits of the appeal in the appropriate case. (Copies of the *Matista* and *Persico* decisions are attached hereto as Appendixes "B" and "C" respectively).

11. Defendant respectfully requests that this Court reconsider its Order of July 19, 1991, wherein his appeal was dismissed. In granting Defendant his appeal, the orderly administration of justice has not been compromised in that the appellate process as to this case continued in Defendant's absence. The *Mieres* decision recognized the factual similarities between all defendants and the one particular statement which separated Defendant and co-defendant Becerra-Flores from co-defendant Mieres. The statement attributable to co-defendant Mieres was the pivotal point as to whether the District Court's decision which the jury never heard as to Defendant or Becerra, was to be affirmed or reversed. This Court determined that Mieres' statement provided a sufficient link between him and the subject cocaine. At the same time, this Court determined that the evidence against Becerra, without Mieres' statement, was insufficient as a matter of law. Defendant is situated *identically* to Becerra.

12. Consequently, this Court already has considered in a timely fashion, the appeal of the identically-situated co-defendant and ruled accordingly. Moreover, the *Mieres* decision made numerous references to *all* defendants as opposed to just Mieres and Becerra.

13. This Court is in the unique position of having determined the precise legal issues to be raised in Defendant's appeal which are based on facts which this Court previously has entertained. Consequently, no new issues are to be brought before the Court in regard to that which occurred at trial. This Court is not being asked to review a case which has grown stale as a result of Defendant's absence or through the passage of time. Defendant would present his brief and argument in the identical fashion to that which was provided by co-defendant Becerra.

14. Finally, Defendant requests reconsideration so as to prevent a manifest injustice. He was convicted for failure to appear for sentencing and was sentenced to a term of incarceration of twenty-one months on April 12, 1991. Defendant is being punished for his failure to appear. Defendant's sentence as to the instant case is tantamount to additional punishment for the same conduct whereas, but for his failure to appear, the District Court's sentence would have been reversed. Consequently, in essence Defendant is serving a term of incarceration in excess of fifteen years in addition to the twenty-one months he received for his conviction for failure to appear as a result of the same conduct.

15. As an alternative to dismissal of Defendant's appeal, Defendant urges this Court to carry the issue of dismissal with his appeal. In its answer brief, the government can address the propriety of a dismissal by this Court and why this Court can not and/or should not reach the merits of Defendant's argument, particularly in light of the *Mieres* decision. In his reply brief, Defendant would address more fully why his appeal should be entertained and why he and co-defendant Becerra should

be treated in a similar fashion. Defendant expressly notes that even if he was to prevail on appeal, that his would not affect the sentence based on his conviction for failure to appear and he would serve the remainder of his twenty-one month sentence.

WHEREFORE Defendant respectfully requests that his appeal be reinstated and that this Court reconsider its Order of dismissal for the reasons cited herein.

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

By: /s/ Stewart G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
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301 North Miami Avenue
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was mailed this 9th day of August, 1991, to Andrew Oosterbaan, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

/s/ Stewart G. Abrams
Steward G. Abrams

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5083
(D.Ct. No. 88-10035-CR-KING)

(Caption Omitted In Printing)

(Filed August 23, 1991)

GOVERNMENT'S RESPONSE TO APPELLANT'S MOTION TO REINSTATE APPEAL AND FOR RECONSIDERATION OF ORDER GRANTING APPELLEE'S MOTION TO DISMISS

Appellee United States of America respectfully responds to appellant Jose Antonio Ortega-Rodriguez's Motion to Reinstate Appeal and for Reconsideration of Order Granting Appellee's Motion to Dismiss as follows.

INTRODUCTION AND FACTS

1. On March 24, 1989, appellant Jose Antonio Ortega-Rodriguez was found guilty of conspiring to possess with intent to distribute and possession with intent to distribute cocaine on board a United States registered vessel, in violation of Title 46 United States Code, Sections 1903(a), (g) and (j), and Title 18 United States Code, Section 2 (R1:61)

2. The trial court scheduled appellant's sentencing for June 15, 1989, at 9:00 a.m., and gave appellant both oral and written notice of the sentencing date (R1:65).

3. Appellant failed to appear for his sentencing (R1:77), and became a fugitive from justice (R1:79). He

was sentenced in absentia to a period of incarceration of 235 months (R1:81).

4. On May 24, 1990, after being a fugitive for almost one year, appellant was arrested (R1:100).

5. On June 21, 1990, appellant was indicted for contempt of court and for failing to appear for sentencing.[1]

6. On January 7, 1991, appellant was found guilty of both counts in the indictment.

7. On appellant's motion, his sentence imposed on June 15, 1989, was vacated by the District Court on October 12, 1990 (R1:104; 112). Subsequently, on January 11, 1991, appellant was resentenced by the District Court to a period of incarceration of 188 months (R1:119; 120).

8. Appellant then appealed (R1:121).[2] His brief was filed on April 24, 1991.

9. On May 15, 1991, appellee filed a Motion to Dismiss Appeal and Motion to Extend Time for Briefing Schedule Pending Decision on Motion to Dismiss. Appellant responded in objection on May 21, 1991.

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[1] The district court case number for this case is 90-398-Cr-King. The appeals court number is unknown.

[2] The record on appeal for case no. 91-5083 consists of three volumes. The volumes are numbered and designated one through three. Volume one contains the pleadings, motions and other papers. Volume two is the transcript of the sentencing proceedings on June 15, 1990. Volume three is the transcript of the sentencing hearing on January 11, 1991.

10. This Court granted appellee's motion and dismissed appellant's appeal on July 19, 1991.

APPELLANT'S RECONSIDERATION MOTION

1. In his appeal, appellant argued that this Court's decision in *United States v. Mieres*, 919 F.2d 652 (11th Cir. 1990), wherein a co-defendant's conviction was reversed for insufficient evidence, should lead this Court to similarly reverse appellant's conviction. Appellant asserted that the evidence presented against him was identical to the evidence against co-defendant Becerra, whose conviction was reversed.

2. In response to appellee's motion to dismiss appeal, appellant urged this Court to follow and adopt case law outside this circuit, and to consider the merits of appellant's appeal notwithstanding the well-settled precedent in this Circuit which precludes appellant from raising trial issues, such as insufficient evidence, on appeal. According to this case law, by fleeing and becoming a fugitive after his conviction and prior to sentencing, appellant waived his right to appeal from his conviction.

3. Appellant's present motion raises no new issues or factual considerations. The motion offers no basis for reconsideration that has not previously been presented and argued to this Court.

ARGUMENT

1. In *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982) *cert. denied*, 460 U.S. 1015, 1035 Cr. 1259 (1983), this Court held "that a defendant who flees after

conviction but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." *See also United States v. London*, 723 F.2d 1538 (11th Cir. 1984).

2. Appellant fled after his conviction and before his sentencing (R1:134), and for almost one year was a fugitive from justice. Under the holding in *Homes*, he is precluded from challenging his 1989 conviction for conspiracy and possession with intent to distribute cocaine. Likewise, appellant is not entitled to benefit from the properly preserved rights of appeal exercised by his co-defendant. Accordingly, this Court properly dismissed appellant's appeal.

3. In his Motion to Reinstate Appeal and for Reconsideration of Order Granting Appellee's Motion to Dismiss, appellant presents precisely the same issues, factual considerations and legal arguments previously offered to this Court. Nothing in his present motion was not already considered by this Court prior to the Order dismissing appellant's appeal. As no basis for reconsideration exists, appellant's motion should be denied.

CONCLUSION

According to well-established case law, appellant Jose Antonio Ortega-Rodriguez is precluded from appealing his conviction. Consequently, this Court properly dismissed his appeal. As his present motion presents no new

issues, factual considerations or legal argument, appellant's request for reconsideration should be denied.

Respectfully submitted,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

By: /s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
ASSISTANT UNITED
STATES ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of August, 1991, to **Stewart G. Abrams**, Esquire, Assistant Federal Public Defender, Attorney for Appellant, 301 North Miami Avenue, Miami, Florida 33128.

/s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
ASSISTANT UNITED
STATES ATTORNEY

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-5083

(Caption Omitted In Printing)

REPLY TO GOVERNMENT'S RESPONSE TO
APPELLANT'S MOTION TO REINSTATE APPEAL
AND FOR RECONSIDERATION OF ORDER
GRANTING APPELLEE'S MOTION TO DISMISS

Defendant-appellant Jose Antonio Ortega-Rodriguez (hereinafter "Defendant"), through counsel, respectfully replies to the government's response to [his] Motion to Reinstate Appeal and for Reconsideration of Order Granting Appellee's Motion to Dismiss[1] and says:

1. The government is well aware that Defendant has received a sentence of twenty-one months for his failure to appear at the sentencing. Defendant will serve this twenty-one months regardless of the outcome of his appeal in the instant case.

2. Similarly, the government is aware that Defendant is situated identically to co-defendant Becerra as to the facts and circumstances of the underlying case and the referenced co-defendant has been released from incarceration based on the reversal of his conviction by this Court.

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[1] Although the certificate of service in the government's response is dated August 20, 1991, Defendant did not receive a copy of same until September 16, 1991.

The prosecutor is "the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *United States v. Agurs*, 427 U.S. 97 (1976), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935). Despite this duty, by attempting to deny Defendant his appeal, the government propounds that Defendant should serve an additional one hundred and eighty-eight months of incarceration for conduct which it knows that this Court has determined is insufficient evidence of a crime. As noted, Defendant already is serving twenty-one months as a result of his errant behavior in regard to his non-appearance at sentencing. Unsatisfied, the government wishes Defendant to serve an additional fifteen plus years.

As an alternate basis for appellate review, on January 9, 1991, Defendant filed a renewed Motion for Judgment of Acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure.[2] Although the referenced motion was filed well beyond the seven-day limitation of the referenced rule, citing *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989), Defendant noted that under its inherent supervisory power, the District Court may consider an untimely post-trial motion for judgment of acquittal or may grant such a motion sua sponte to correct manifest error when it retains jurisdiction over the

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[2] Rule 29(c) of the Federal Rules of Criminal Procedure provides in applicable part: If the jury returns a verdict of guilty . . . a motion for judgment of acquittal may be made or renewed within seven days after the jury is discharged or within such further time as the Court may fix during this seven-day period. If a verdict of guilty is returned the Court may, on such motion, set aside a verdict and enter judgment of acquittal.

case. *Id. See also United States v. Coleman*, 811 F.2d 804, 806-7 (3rd Cir. 1987). Defendant's motion was predicated upon this Court's holding in *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), i.e., the appeal as to Defendant's co-defendants wherein the convictions of co-defendant Becerra were reversed. Defendant's Motion for Judgment of Acquittal subsequently was denied by the District Court. Defendant timely filed his Notice of Appeal following the denial of his renewed Motion for Judgment of Acquittal and his sentencing by the District Court.

WHEREFORE Defendant respectfully urges this Court to reinstate his appeal for the reasons cited herein.

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

By: Stewart G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
Florida Bar No. 371076
301 North Miami Avenue
Miami, Florida 33128
(FTS) 350-6900

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was mailed this 20th day of September, 1991, to Andrew Oosterbaan, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

/s/ Stewart G. Abrams
Stewart G. Abrams

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5083

(Caption Omitted In Printing)

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: KRAVITCH, HATCHETT and COX, Circuit Judges.

BY THE COURT:

Appellant's motion to reinstate his appeal is DENIED.

Appellant's motion for reconsideration of the July 19, 1991 order granting appellee's motion to dismiss is DENIED.

(Filed January 22, 1992)

SUPREME COURT OF THE UNITED STATES

No. 91-7749

Jose Antonio Ortega-Rodriquez [sic],

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 15, 1992